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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 79.

CLARENCE G. KUNSMAN,
Defendant-Appellant,

vs.

MAX FACTOR & CO., AND SALES BUILDERS, INC.,
Plaintiff-Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED MAY 25, 1936.

BRIEF FOR AMERICAN BOOKSELLERS' ASSOCIATION, *AMICUS CURIAE*

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BRIEF FOR AMERICAN BOOKSELLERS ASSOCIATION, *AMICUS CURIAE.*

May it please the Court:

Defendant-appellant, Kunsman, will be referred to throughout as defendant and the appellees as plaintiffs.

The case involves the question whether Section 1½ of the so-called California Fair Trade Act which applies the doctrine of unfair competition to the protection of vertical resale price contracts relating to trade-mark commodities is in violation of Section 1 of the 14th Amendment to the Constitution of the United States.

Defendant does not question the validity of the contracts, but questions the constitutionality of the method adopted to protect them against nullification by strangers.

The case arises on demurrer and the facts as pleaded are admitted.

The Admitted Facts (T. R. 1-21).

Plaintiffs are engaged in the manufacture and sale of certain trademark commodities (T. R. 2-3) which are in fair and open competition with commodities of the same general class produced by others (T. R. 6-9). Plaintiffs established certain wholesale and retail prices for said trademarked products, but there developed years ago a practice among certain "Cut Rate Drug Stores" of selling trademarked products at prices conspicuously below the established prices and the resulting retaliatory price-cutting caused the goods in many cases to be sold at a loss thus depriving the producer of a market and injuring or destroying his good-will (T. R. 7).

To remedy the many evils of these price cutting practices, California passed an act entitled and reading as follows:

> An act to protect trademark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trademark, brand or name.
>
> (Approved May 8, 1931, Stats. 1931, p. 583. In effect August 14, 1931.)
>
> 1. Certain sale contracts declared lawful.
>
> 2. Exception.
>
> 3. Definition.
>
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>
> 5. Short title.
>
> 1. Certain Sale Contracts Declared Lawful.—No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears the

trademark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the state of California by reason of any of the following provisions which may be contained in such contract:

1. That the buyer will not resell such commodity except at the price stipulated by the vendor.

2. That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

1. In closing out the owners' stock for the purpose of discontinuing delivering any such commodity.

2. When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

3. By any officer acting under the orders of any court.

"2. Exception.—This act shall not apply to can contract or agreement, between producers or between wholesalers or between retailers as to sale or resale prices.

"3. Definitions.—The following terms, as used in this act, are hereby defined as follows:

'Producer' means grower, maker, baker, manufacturer or publisher.

'Commodity' means any subject of commerce.

"4. Constitutionality.—If any provision of this act is declared unconstitutional it is the intent of the legislature that the remaining portions thereof shall not be affected but that such remaining portions remain in full force and effect.

"5. Short title.—This act may be known and cited as the 'Fair Trade Act'."

The Section in Question.

Section 1½ of said Fair Trade Act, being the provision whose constitutionality is here involved, was added in 1933 (Stats. 1933, Chapter 260, page 793) and provides as follows:

"Sales below contract price.—Wilfully and knowingly advertising offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

Plaintiffs, as authorized by the Act, made contracts with practically all the wholesalers and retailers in California prescribing fair and reasonable prices for their trademarked goods, said prices being admittedly no higher than required to yield the distributors a reasonable compensation for their services (T. R. 9).

A contract was tendered to defendant who refused to execute it and thereupon plaintiff refused to sell to defendant (T. R. 10).

Defendant thereupon secured said trademarked products from sources unbeknown to plaintiffs and sold and con-

tinues to sell them at cut prices without closing out the line (T. R. 11 and 13).

Unless defendant is restrained under the Fair Trade Act, plaintiffs' dealers will cancel their contracts so as to be free to meet defendant's prices, predatory price cutting will again ensue, plaintiffs' business and good-will will be injured if not wholly destroyed, and plaintiffs' distributors will be prevented from earning a reasonable profit in the sale of plaintiffs' trademarked products (T. R. 12-13).

Plaintiffs have no remedy at law and seek an injunction to restrain defendant from selling plaintiffs' trademarked commodities at prices less than those prescribed in the retail contracts (T. R. 14).

The demurrer was sustained by the Superior Court but overruled on appeal by the Supreme Court of California.

The appeal is directed to the one contention that Section 1½ of the California Fair Trade Act violates Section 1 of the 14th Amendment to the Constitution of the United States. (T. R. 58-59.)

As the book departments of department stores, cut rate chain stores, catalog houses and the like have largely become "loss leader" departments, to the grave injury of independent book dealers, American Booksellers' Association has applied for leave to file this brief as *amicus curiae* in support of the constitutionality of Section 1½ of the Act in question.

The Questions.

Defendant's sole contention is that Section 1½ of the California Fair Trade Act is unconstitutional because violative of Section 1 of the 14th Amendment to the Federal Constitution reading:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Defendant concedes the power and right of California to lift the ban of the common law rule against alienation* and of the rules and statutes against restraints of trade from vertical but not horizontal contracts relating to resale prices of trademarked articles of a competitive nature while in lively course of trade and subject to definite exceptions as to close-out or "dead line", deterioration or court order sales, but affirms that the 14th Amendment inhibits the state from protecting such contracts against wilful nullification by non-conforming dealers.

Defendant apparently seeks to present the case as though it concerned an attempt by the state to subject plaintiff's trademarked goods owned outright by defendant, to the servitude of admittedly fair prices set up by admittedly lawful contracts made by others before or subsequent to appellant's acquisition of title.

But that question does not arise in this case or in real trade practice. The Act permits defendant to close out

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*"'. . . a general restraint upon alienation is ordinarily invalid. 'The right of alienation is one of the essential incidents of a right of general property in movables, and restraints upon alienation have been generally regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand. General restraint in the alienation of articles, things, chattels, except when a very special kind of property is involved, such as a slave or an heirloom, have been generally held void.' 'If a man', says Lord COKE, in 2 Coke on Littleton, sec. 360, 'be possessed . . . of a horse or of any other chattel, real or personal, and give or sell his whole interest or property therein, upon condition that the donee or vendee shall not alien the same, the same is void, because the whole interest and property is out of him, so as he hath no possibility of a reverter; and it is against the trade and traffic and bargaining and contracting between man and man.' John D. Park & Sons Co. *vs.* Hartman, 12 L. R. A. (N. S.) 146, 82 C. C. A. 158, 153 Fed. 24. See also Gray, Restraints on Alienation of Property, Secs. 2, 28." Mr. Justice HUGHES in *Dr. Miles Med. Co.* vs. *John D. Parks & Sons Co.*, 220 U. S. 373, 55 Law Ed. 503.

his supply of plaintiffs' trademarked goods, however acquired, at any prices he pleases and at any time, and whether acquired before or after the contract system is set up.

That is not what defendant seeks. He claims that the 14th Amendment guarantees him a sort of vested right to continue to purchase new supplies of plaintiffs' trademarked products from secret sources and to sell them right along in California at cut or close-out prices without closing out the line and without liability for damages for the admitted nullification or cancellation thereby worked upon the admittedly legal contracts.

And the question is: does the 14th Amendment to the Federal Constitution guarantee to defendant any such alleged right to continue a cut-rate business in plaintiff's trademarked products after the contracts have been set up?

Defendant admits that when he cuts the price on Max Factor products, other dealers have to meet the cut or close out the line and competition finally brings the price to a loss level.

The question then comes down to this:

Defendant claims that the 14th Federal Amendment guarantees him a continuing right to fix a loss-price on plaintiffs' branded goods in the hands of their dealers but denies that said amendment guarantees plaintiffs a right to fix a reasonable and profitable price on the same trademarked goods in the hands of defendant, and the question is as to the legislative and judicial power of California to regulate these conflicting rights in the public interest.

Does the 14th Amendment guarantee to those who make concededly lawful resale price contracts in intrastate commerce in California a right to have their lawful contract rights protected against what the legislature regards as unfair competition by strangers?

Is not the defendant the one who really seeks to violate the 14th Amendment by depriving plaintiffs and their distributors of property and rights without due process of law by continuing to tear down and wreck a system of California contracts which he concedes to be lawful as between the parties but which he claims a sort of vested right under the 14th Amendment to wreck or nullify?

It is settled doctrine that the judicial power of this court is limited:

> 1. To determining whether the subject-matter of the legislation is within the state's power under the Federal constitution; that is, whether the state legislature has power to limit, control or regulate methods of trade and competition within the state.
>
> 2. To determining whether the means adopted (a) by legalizing vertical contracts as to competitive trade-marked goods with the close-out sale and other exceptions noted, and (b) by declaring that wilful interference is actionable as unfair competition, are violative of the Federal constitution because they are:
>
> 1. Not reasonably designed to accomplish the purpose in view;
>
> 2. Do not have a real and substantial relation to the objects sought to be accomplished;
>
> 3. Are arbitrary, discriminatory or capricious.
>
> *Nebbia* v. *New York,* 291 U. S. 502, 54 Sup. Ct. R. 505.

It is submitted that a correct answer to these questions requires a full consideration of the entire trade situation with which California had to deal and we have taken up the matter in that way as to both intrastate and interstate commerce in California.

Summary.

1. A trademarked or branded commodity is a special fungible:

(a) Constituting an exception to the rules concerning alienation and trade-restraints,

(b) therefore capable of being transferred subject to a valid restriction voluntarily assumed by the new owner to resell only at a certain contract price which is being currently charged by other contract-dealers handling the same trademarked article.

Propositions (a) and (b) are not questioned by the defendant on this appeal.

(c) Therefore, the State, under its regulatory and police powers, may lawfully outlaw, as unfair competition, the business of dealing in such trademarked commodity at a cut or non-contract price unless:

(1) To sell out the line or

(2) When the commodity is damaged or deteriorated.

(3) Under order of court.

The appeal as presented questions only proposition (c) as to the police and regulatory powers of the state to protect the contracts against nullification by strangers.

2. A trademarked commodity is a special fungible, properly excepted by the state from the operation of the rules against alienation and restraints of trade, and therefore capable of transfer under a lawful contract restricting the resale price, and the state therefore has power to protect such contracts against nullification by strangers, under the doctrine of unfair competition, because all of the commodities identified by a certain trademark:

(a) Come from one common source of origin.

(b) The source is publicly advertized on the article by the display of the trademark.

(c) All similar articles under that trademark are standardized as to quality and interchangeable as to value.

(d) The trademark owner receives good-will for good quality or bad-will for defects.

(e) All such articles under one trade-mark, being stamped as standard as to origin and value by the trademark, are capable of being sold only at one price at the same time in the same market. That is to say when one dealer in a certain shopping market marks down an Ingersoll Dollar Watch or a book called "Anthony Adverse" of a certain edition, that dealer thereby marks down that watch or that book to that same price on the shelves of all other dealers in that market at that time, because the operation of the law of market price is inexorable and inescapable. There can be only one price for the same thing in the same market at the same time. The trademark or imprint is the public symbol and guarantee that the Ingersoll watch or the book "Anthony Adverse" is *the same thing* as every other "Ingersoll" or "Anthony Adverse", whether in the hands of one dealer or another. Therefore one dealer would not even try to charge the regular contract price for that thing if another dealer in the same article was offering it at a lower price at that time. This fact is admitted in the case at bar.

(f) There can be no such thing as true individual freedom as to trademarked fungibles such as Ingersoll watches, Ford automobiles or books of the same title, edition and imprint or the like. Two men may own a dog but if one owner decides to kill his half,

he kills the other man's half also. King Solomon wisely decided that the woman who was willing to take one severed half of a live child did not own either half.

(g) When defendant argues that he merely wishes to do with his own as he pleases, plaintiff answers that he can do that lawfully by closing out the line. But when defendant argues that he should be permitted to keep on injuring all other dealers by stocking up with a new supply so as to go on selling right along at cut prices, then defendant is disingenuous in claiming that the 14th Amendment guarantees him a right thus to mark down the price of the same article on the shelves of thousands of other dealers in the same article in the same market at the same time, as he admittedly does.

(h) On the ground of the greatest good to the greatest number, the 14th Amendment guarantees the right of these thousands of regular dealers to purchase the same thing for resale under lawful contracts at the same admittedly reasonable price as is charged by other dealers and to look to the state to guard such lawful contracts against destruction by scab dealers or price-cutters like the Ticket Scalpers whose business was enjoined and destroyed by this Court in *Bitterman* v. *Louisville and Nashville Railroad Co.*, 207 U. S. 205, 52 L. Ed. 171.

(i) Such trademarked fungibles usually are sold at an advertized price, frequently marked on the article, and, where freight is material, F. O. B. a base point.

(j) It is really the producer and not the retailer who promotes the sale of a trademarked commodity. The retailer collects the retail price but the producer does the advertizing.

(k) Producer advertizing is diametrically opposite to all legitimate dealer advertizing. The legitimate dealer advertizes in effect "Come to my store and buy on my reputation as a retailer." The producer advertizes "Buy my branded article wherever you find it. It is just as reliable—just the same thing—when sold by one retailer as another." The retailer seeks to instill his advertizing and good-will into his store; the producer, into his *branded product.* When a retailer advertizes a branded product at a cut price, he is indulging in lawful larceny. He is stealing the producer's national or product-advertizing for the retailer's ulterior purpose. Price-cutting is a cheap way of drawing trade to an unscrupulous retailer who does not care how much he injures the branded product by driving it down to a price level at which legitimate dealers cannot make a profit on it. The difference between product-advertizing or so-called "national-advertizing" of a producer of a trademarked product, on the one hand, and of a legitimate retailer who advertizes himself or his store rather than seeking to magnetize a particular branded product with his good-will or reputation, strongly emphasizes the fact that a trademarked or nationally advertized article is a very special kind of property constituting an exception to the rule against alienation. The producer can lawfully buy and pay for the advertizing of a self-selling or magnetized trademarked product, but a tricky retailer can then lawfully steal the advertizing for himself, unless the act in question is valid.

3. Where *the same thing* (*i. e.,* articles whose fungibility and common source of origin are attested by the producer's trademark) can have only one price at the same time in the same market (because no purchaser will pay more than the lowest price offered in that market and no seller will take less), the question is whether that *one price* shall be set by

knaves acting for some ulterior purpose of their own, as Mr. Justice HOLMES fairly stated it in his dissenting opinion in *Miles* v. *Park,* 220 U. S. 373, 55 L. Ed. 502, 31 Sup. Ct. 376, or whether that one price shall be set by voluntary contracts between the producer and the great body of dealers (who, along with the public, do not have to buy the article at all or can freely turn to a competitive make)? When knavish or loss-leader competition sets the standard, uniform or one and only price which a standard article can bring at that time in that market, we see conditions like those under which the Modern Library (Dollar) Books were advertized by price-cutters for sale in the New York market new at *nine cents per copy!* We see R. H. Macy & Co. admittedly paying one dollar per copy for Amelie Rives' "The Castaway" and reselling it at *eighty-nine cents!* (See opinion in *Bobbs-Merrill* v. *Straus,* 210 U. S. 205.) Scab labor cannot long endure at a below-cost standard of living, but a scab-price-cutter can lose heavily on "The Modern Library" or the "Castaway" and charge the losses to advertizing because the practice lures people down to a grossly expensive store where the crowds can be overcharged on other lines of goods.

Defendant claims that plaintiffs and thousands of regular California dealers attempt, under legislative sanction, to fasten a concededly fair and reasonable price on defendant, but the stark fact is that defendant seeks by his individual act and for a grossly selfish purpose, to fix an unreasonable and unfair price on plaintiffs and their fair and regular dealers.

Plaintiffs deny there is any price-fixing involved in this because their contract price must be fixed in a highly competitive market by

(1) the consumer who does not have to buy an over-priced article;

(2) the dealers who do not have to handle

(3) the producer who is looking for the price of greatest return which usually means wide distribution at reasonable prices and

(4) competitive producers of both branded and unbranded goods who are always ready to undersell an over-priced article.

But if there is price-fixing involved, then the defendant seeks to fix his price on identically the same article on the shelves of all dealers at the same time in the same market. Defendant cannot have it both ways. If it is fair for defendant to have an individual right to mark down or fix a ruinous price on goods owned by thousands of dealers in the same market, it cannot be unfair for the legislature to authorize such dealers to impose *a concededly fair, reasonable* and *competitive* price on defendant.

4. Because the law of market price or fungibility decrees that there can be only one price for the same thing in the same market at the same time, and because, when that one and only price for an article whose fungibility or family relationship to its fellows, is attested by a trademark, is fixed by individual whim, that one price goes down to an uneconomic or unprofitable level gravely injurious to producer and dealer alike (and therefore injurious in the long run to the public), producers and dealers alike have worked out and adopted various concededly lawful systems for preventing any articles bearing a certain trademark from falling into the hands of price-cutters. Make no mistake. The several expensive and cumbersome legal devices for effectively establishing standard prices on trademarked commodities are *lawful boycott devices.*

They are plans by which producers and dealers lawfully cooperate to prevent price-cutters from securing the trademarked article in any practical way. The producer deals only with regular distributors or wholesalers who in turn agree to deal only with regular and authorized dealers who in turn must deal only with the public (*U. S.* v. *General Electric Co.,* 272 U. S. 476, 71 L. Ed. 362). If price-cutters could secure the goods for resale at cut-prices, the whole plan would be vitiated—made worse than useless—converted into a hideous and absurd expense with its one and only purpose and object frustrated by those at whom it is aimed.

5. Retail and wholesale price stabilization of either trademarked or unbranded commodities, whether or not they are in fair and open competition with similar commodities of other producers, is lawful and not regarded as unlawful "price-fixing" or as an unreasonable combination in restraint of trade or as an unlawful boycotting of price-cutters, or as a violation of either the letter or spirit of the rule against alienation, when effected:

a. by combining wholesalers and retailers as agents of a common principal and not passing title to the commodities until the final sale to a consumer.

Miles v. *Park, supra;*
U. S. v. *Gen. Electric, supra.*

b. by establishing chains of stores or service stations. *U. S.* v. *American Tobacco Co.,* 221 U. S. 106, in which the legality of United Cigar Stores Company, as a chain organization, was recognized. Trademarked shoe manufacturers use chain stores to standardize the prices on their special brands of shoes.

c. by establishing wholesale depots, producer-owned, in all large markets and keeping retailers on a

hand-to-mouth basis whereby any retailer who cuts a price today can secure no more supplies tomorrow.

U. S. v. *Colgate,* 250 U. S. 300.

This plan clearly involves a projection of the control of the producer over articles sold to and owned by another. The dealer-owner is effectively restrained from selling the articles he owns at any price he pleases because he knows that if he does so, he will be at once cut off from getting any new supplies of the same trademarked article. The title has passed but the producer's control continues in a completely effective way.

6. Retail and wholesale price stabilization established by vertical resale price contracts, protected, under the law, against nullification by strangers, and limited to trademarked commodities which are in free and open competition with similar branded and unbranded commodities of other producers, is less oppressive to the public, more open to use by small producers with capital too limited to continue to own their goods throughout wholesale and retail distribution, and more protective of single store or small retailers than are the lawful methods of price-stabilization based on agency, consignment, refusal of sale or chain outlet devices. Such resale price protection based on protected vertical contracts does not constitute unlawful price-fixing or contracts in unreasonable restraint of trade, any more than the combining of thousands of retailers as consignment agents of a common principal constitutes an unlawful boycott or combination in restraint of trade to fix prices.

7. The contrary conclusion reached in *Miles* v. *Park, supra,* namely, that vertical contracts, in interstate commerce, with title passing and future sales restricted, are

contracts in restraint of trade but that vertical agency combines to attain the same result in a more expensive and oppressive way, are not boycotts or *combinations in restraint of trade,* is based (a) on a misconception of the rule against alienation and (b) on a failure to realize that trademarked goods are a very special kind of fungible or family-relationship property in which certain obligations and rights of the producer run with the goods and are inalienable wherefore such goods can lawfully be alienated subject to state-protected contracts setting up price restrictions on future sales.

8. Price maintenance on branded products is either good or bad, *per se.* If it is good, it is just as good when based on contracts protected against unfair competition, as on boycott combinations of consignment agents, and vice versa.

9. The direct economic consequences of the Miles-Park and General Electric rules holding that price maintenance by vertical resale contracts with passage of title is bad, but that price maintenance based on the boycotting of price-cutters by means of vertical combinations of consignment agents without passage of title or on refusal of further sales after passage of title, is good, have been appalling and disastrous.

10. Agency combinations unchecked by the competition of vertical resale protected contract systems, have converted a political economy formerly characterized by small capital producers, single unit wholesalers and one store retailers into a regimented economy of chain organizations and holding companies pyramided on chains of chains.

11. Not since the Dred Scott decision have such amazing, contrary, uncalculated and undesired results flowed from a judgment of this court as have resulted from the Miles-Park rule. If that rule is to stand as embalmed in the 14th Amendment and to be imposed upon the intrastate commerce of California and other states by vitiating Section 1½ of the Act in question, it can conservatively be predicted that the economic regimentation of the country will be completed within a few years.

12. The United States must take its position either for or against price-maintenance on branded goods, however effected and whether in interstate or intrastate commerce. Any middle ground will soon make a national economy pivoted on competition a thing of the past. A house divided against itself cannot stand—and a judicial policy that permits plutocratic forms of price maintenance when based on a refusal of further sales after title has passed or on a combination of thousands of consignment agents, stores, service stations or sales branches without transfer of title, but that prohibits democratic forms of price maintenance based on vertical resale price contracts with transfer of title and protection against nullification by strangers, will go down in history as the worst restraint of trade that has ever fastened itself on a modern nation, and the fact that this judicial restraint of trade comes from wrongfully classifying fungible or family-type trademarked goods under the rule regulating alienation instead of under the exception to the rule, as all other modern nations except Canada have done, will not mitigate the already appallingly serious consequence of the mistaken policy.

13. California, like Washington and other states, refused to follow the Miles-Park Rule, and its legislature has specifically recognized price-maintenance based on vertical resale price contracts protected against nullification by strangers as being just as lawful as when effected by boycott combinations of consignment agencies, chains or the like or by placing a servitude on goods already sold by refusal of further supplies if prices are cut.

14. Price maintenance limited to trademarked goods which are in competition with similar commodities produced by others under different trademarks or in bulk, having always been lawful in California and being now specifically legalized when based on contract, it is a mere exercise of the police power to declare that the same distinctively branded or trademarked goods in the channels of trade are subject to the servitude of such lawful contracts when held by strangers who do not wish to close out the line.

15. The legislation is within the power of the state, reasonably shaped to the end in view, not arbitrary, discriminatory or capricious and in every way in the public interest.

16. The principles of ownership and of free-contract should be restored to a parity under the Sherman Anti-Trust Act (U. S. C. Title 15, Sec. 1, July 2, 1890, c. 647, Sec. 1, 26 Stat. 209).

If producers and dealers can lawfully combine under the forms of ownership, holding company, agency or refusal of sales to standardize retail prices on trademarked goods (as they admittedly can), then the same producers and dealers should be able lawfully to accomplish the same result

by resale price contracts protected against the unfair competition of price-cutters.

To widen or liberalize the meaning of the term "combination" in restraint of trade in the Sherman Anti-Trust Act (*supra*), so as to adjudge that the vast congerie of mines, railroads, steamship lines, blast furnaces, rolling mills, distributing agencies and other devices for controlling all prices from the Mesaba Range to the final consumer all under the plutocratic control or ownership of the United States Steel Corporation, *is not a combination in restraint of trade* (*U. S.* v. *U. S. Steel Corporation,* 251 U. S. 417, 64 L. Ed. 343), but that the system or vertical resale price contracts between the comparatively small Dr. Miles Medicine Company and its otherwise independent wholesalers and retailers were *contracts in restraint of trade* (*Dr. Miles Medicine Co.* v. *John D. Parks & Sons, supra*) is:

a. to decree that chain stores, catalog houses and other price-cutters shall grow apace at the expense of small independent dealers who pay local taxes.

b. to force large capital producers to adopt autocratic, maximum capital schemes for keeping their goods out of the hands of price-cutters.

c. To reduce the Sherman Anti-Trust Act to a legal monstrosity as a breeder rather than a destroyer of trusts and restraints of trade.

The Great Atlantic and Pacific Tea Company, better known as the A. & P. Company, is the largest chain of grocery stores in the world.

A. & P. did more business in 1934 than the Ford Company, Sears Roebuck, Montgomery Ward, and the James Cash Penney stores combined. Its total trade was $819,616,727.

A. & P. has 90,000 employees, operates 16,000 stores, 52 warehouses, 39 produce, 12 meat, 5 fish, and 3 but-

ter plants, 40 bakeries, 6 salmon canneries, 9 milk plants, 9 general factories, 8 coffee-roasting plants, one printing plant and a fleet of fishing boats.

A. & P. is not a "combination" in restraint of trade, but resale contracts between the Dr. Miles Medicine Company and its independent distributors are unlawful "contracts" in restraint of trade!

These two results simply do not make sense. If the Miles-Park contracts are unlawful, but the Steel Corporation, the General Electric boycott combine and the A. & P. Company are not unlawful combinations, then the Sherman Anti-Trust Act has become the father of trusts, the most prolific breeder of combinations and restraints of trade that any modern nation ever enacted.

17. To place contract rights back on a parity with ownership, consignment, agency or refusal of sales rights under the Sherman Anti-Trust Act and the 14th Amendment, by recognizing that trademarked goods are in fact and in law a very special kind of property constituting an exception to the rule against alienation and thus capable of transfer alike in *interstate* and intrastate commerce in California under vertical contracts subject to automatic close-out, damaged goods and Court order sales, such contracts to be protected against the unfair competition of price-cutters, (a) would be an act of simple and much needed justice; (b) would restore the Sherman Anti-Trust Act to its real function as a foe rather than a breeder of trusts and restraints, (c) would once more place the monopolistic weapon of unfair price-cutting back where it belongs as a thing condemned rather than protected by the Sherman Anti-Trust Act and the 14th Amendment and (d) would once more place small producers and small distributors with their protected contract rights on a competitive parity with large producers with their destructive twin weapons of plutocratic and autocratic sys-

tems of price-protection and their monopolistic weapon of predatory price-cutting.

18. In all important foreign countries, except Canada, price maintenance on trademarked articles is just as lawful and good when based on protected contracts as it is when effected by agencies, consignment, or refusal of sales devices.

19. Price-cutting has been outlawed as applied to many similar forms of fungible goods and services in the United States, such as postage-stamps, railroad tickets, newspapers, magazines, insurance policies, stock exchange and other forms of brokerage, etc., without restraining trade or eliminating competition.

20. Section 1½ is the heart of the Act. If that be killed, the Act dies with it.

21. California has power and right to reject such a construction of the law as applied to its intrastate commerce.

22. The system of vertical resale price contracts relating to Max Factor trademarked products and protected against the unfair competition of price-cutters is not prohibited by the 14th Amendment to the Federal Constitution and is lawful both in interstate and in intrastate commerce in California and was lawful both before and after the passage of the California Fair Trade Act, the reasoning of this Court in *Miles* v. *Parks, supra,* to the contrary notwithstanding in so far as that reasoning might influence or affect either intrastate or interstate commerce in California.

ARGUMENT.

The demurrer concedes (a) that the Max Factor trademark-contracts in issue are lawful and enforceable in California and (b) that defendants' cut-rate practices will force plaintiffs' dealers to cancel the contracts to the injury of plaintiffs and their dealers.

The contracts being admittedly lawful, the 14th Federal Amendment guarantees to plaintiffs and their dealers the right to enjoy the fruits of these lawful contracts and both the legislative and the judicial power of California may be invoked to protect these lawful contracts against nullification by strangers or others acting to bring about a cancellation or nullification of the contracts.

Bitterman v. *Louisville & N. R. Co.*, 207 U. S. 205, 52 L. Ed. 171, 21 Sup. Ct. 91;

Angle v. *Chicago, S. P. and M. R. Co.*, 151 U. S. 1, 35 L. Ed. 55, 14 Sup. Ct. 240, and authorities cited in both these cases.

Assuredly the legislative and judicial power of California can be invoked to deprive the public of the transient if not illusory advantage of price-cuts on some well known or "loss-leader" items currently attended by overly-high prices on items of unknown value, especially where that practice, like other forms of monopolistic or unfair price-cutting, tends to eliminate small or independent dealers and in the long run to oppress the public by forcing it to deal with expensive and monopolistic chain organizations and the like.

This court in the two cases above cited deprived the public of bargain rates on tickets because such rates were immediately injurious to the railroads and, in the long run, to the

public. The tickets were fungible or family-type products controlled by the law of market price. Either the scalpers would mark down the price to an unfair level or the railroads had to be protected in marking up the price to a fair level.

Regular retailers operating under concededly lawful contracts which establish admittedly reasonable prices on trademarked goods, are just as deserving of protection under ordinary judicial, legislative and police powers as are the railroads. At least there is nothing in the 14th Federal Amendment which prohibits California from extending such protection to lawful contracts.

It is thought that on the basis of the admitted legality of the resale price contracts in issue, there can be no question as to the power of California to protect them as property or rights the enjoyment of which is guaranteed to plaintiffs and their dealers by the very 14th Federal Amendment on which defendant seeks to base his privilege of destroying or nullifying such lawful rights.

But, if it should be thought that the real question is not so much as to the power of California to protect legal contracts, but whether or not the contracts really are lawful and in the public interest and worthy of protection, we submit that a candid study of the reason, purpose and effect of the contracts shows that in intrastate and interstate commerce alike the contracts are in the public interest and failure to protect them against unfair competition would be against the public interest.

In short, the ruling in *Miles* v. *Park, supra,* was just as much against the public interest as though the Court in the *Bitterman* or *Ticket Scalper's* case, *supra,* had decided that the public was entitled to the benefit of cut-rate competition in railroad tickets, or even had made the ruling

which defendant asks it to make in this case, namely, that the contracts are lawful but that the cut-raters cannot be enjoined from nullifying them!

Trademarked or branded goods produced by the trademark proprietor and sold by dealers on his name, reputation and good-will in competition with commodities of the same class produced by others are and have long been regarded as a very special kind of property as to which the good-will and reputation of the producer inalienably run with the goods and to whom there is a constant possibility of reverter for defects, repairs or new supplies and by whom the goods are impliedly or expressly guaranteed. Such goods therefore in California have always been treated as an exception to the common law rule against alienation and susceptible to transfer under reasonable vertical price restrictions without violation of the rules or statutes against alienation and unreasonable restraints. *Grogan* v. *Chaffee*, 156 Cal. 611, 105 Pac. 745, and *Ghirardelli* v. *Hunsicker*, 164 Cal. 355, 128 Pac. 1041.

Price maintenance on such special or trademarked fungibles is not unlawful *per se* even in interstate commerce but only when title to the goods is passed. The emphasis on the commercially unimportant rule against alienation or transfer of title has freed the goods but enslaved the formerly free dealers by making them into plutocratically and autocratically regimented agents selling branded goods at controlled if not

manipulated prices, all to the gross injury of trade and oppression of the public. This is the evil with which the legislature dealt in the Act in issue.

If the resale price contracts are valid, it does not seem to us that the question of protecting them against nullification by strangers presents much difficulty of solution. If California may lawfully recognize the contracts as valid, it may certainly protect them. The real issue concerns the validity of the reasons for treating the contracts as valid.

The special nature of trademarked or branded goods is dramatically emphasized by the almost incredible transformation in methods of doing business which have occurred as a result of the decision of this court in the case of *Dr. Miles Medical Co.* v. *John D. Park & Sons Co., supra,* which in effect held that retail price stabilization on trademarked or branded goods like Dr. Miles Medicines, was bad and unlawful if title passed, but good and lawful if title did not pass from producer to dealer; in short, that vertical contracts between the Miles Company and twenty-one thousand wholesale and retail dealers were in unreasonable restraint of trade when title to the goods was transferred in violation of the rule against alienation, but that, if title to the goods did not pass, the Miles Company could lawfully combine the same twenty-one thousand dealers into a vast consignment agency device under the autocratic control of the Dr. Miles Medicine Company to accomplish identically the same result by preventing price-cutters from securing supplies, in a manner much more expensive and oppressive both to the trade and to the public.

That judgment strained at the gnat of vertical price contracts on a branded product while swallowing the camel of vertical combination of the same group of thousands of wholesalers and retailers accomplishing precisely the same result of standardized prices for the Dr. Miles Medicines sold in competition with the remedies of Father John and other medicine companies.

The implications of the decision in *Miles* v. *Park* were followed out in *U. S.* v. *American Tobacco Company, supra,* in which the chain-store device represented by American Cigar Stores Company was recognized as legal. The policy was further expanded in *U. S.* v. *Colgate* (250 U. S. 300, 63 L. Ed. 992, 39 Sup. Ct. R. 465), in which horizontal price stabilization at wholesale and retail was recognized as legal when maintained on the Colgate branded products by refusal to sell the goods to price-cutters. Control over goods already sold was projected by the policy of refusing to sell new supplies if prices were cut on old supplies.

The *Miles-Park* decision was finally capped by the judgment in *U. S.* v. *General Electric, supra,* which specifically recognized the legality of a nation-wide combination of twenty-one thousand sales agents representing a common principal and charging dictated prices on Mazda lamps, the central purpose of the plan being to prevent any Mazda lamps from getting into the hands of price-cutters or other unauthorized dealers.

This almost incredible legal conclusion, namely, that price maintenance on branded goods, when based on refusals of sales, combinations of agents or chain-store devices, was legal both as applied to branded goods and unbranded goods, but that identically the same result was bad when accomplished by vertical contracts limited to branded goods in competition with other similar goods, grew out of an

undue emphasis laid on the old common law rule against alienation and of failure to recognize that branded goods fell under the exception rather than the rule.

It is safe to say that Lord COKE would have recognized, as the English judges since his day have unhesitatingly recognized, that an Ingersoll watch or a Ford automobile is a very special kind of a property to which the name, reputation and good will of the original producer are inalienably attached, running with the goods down to the final consumption of the product, with a constant "possibility of reverter" growing out of the fact that the trademark owner is praised for quality, blamed for defects, looked to for repair, spare parts or replacements and finally depended upon by both trade and consumer as the real promoter of sales and energizer of trade.

Since the *Miles-Park* judgment, a disquieting transformation has occurred in trade conditions within the United States, and in California, without any comparable parallel in other countries which regard trademarked goods as falling within the exception to the rule against alienation.

Three Competing Systems.

Before the *Miles* v. *Park* decision, there were three distinctly recognizable and highly competitive systems of marketing goods in this country, and all three of these competing systems operated through the medium of independent wholesalers and independent retailers.

1. The Unbranded System.

So-called bulk, loose or unbranded goods are things which are anonymously produced. No one cares whether

they come from one producer or another. Being unbranded or maverick goods, they must be sold on the reputation of the retailer who, if legitimate, advertizes himself, his integrity and his store rather than a particular product, its source of origin and the integrity of its producer. The public does not know the producer of bulk or unbranded goods. There are no price restrictions and no marks of origin. Differences in retail price are supposed to be caused by variations in inherent value. Such goods are ineffective as "loss-leaders" because there is no trademark to establish a standard of value and fungibility. The unbranded goods are sold by so-called "local", store or dealer advertizing rather than by "national", "product" or producer advertizing. Dealer advertizing usually goes into the local papers; product or producer advertizing usually goes into the national magazines and the like.

2. The Agency or Consignment System.

This system of merchandising was not confined to either branded goods or to bulk goods. The producer or manufacturer consigns the goods to wholesaler or retailer, retaining title in himself until the final sale to the public. This consignment system is largely devoted to new and untried articles which require expensive educational processes to introduce to the market. Wholesalers and retailers are unwilling to invest capital in these new goods of uncertain selling qualities. Therefore the producer assumes the risk by placing the goods on consignment with the trade and by allowing the dealers long profits to compensate them for their trouble in working up sales and educating the public in the use of the new razor, massage device or what not.

3. The Trademarked, Branded or Vertical Contract System.

After the trade and the public became educated in the use of new devices initially marketed under the consignment plan and when the devices were widely distributed so as to justify advertising in a national way, it was much cheaper for producer, wholesaler, retailer and the public to dispense with the consignment system and market the goods under the vertical resale contract system, relying on the producer's advertizing and reputation as the principal energizer of sales, rather than on any special sales effort of the dealer who is a mere neutral broker or agent of the producer in actual sales fact and substance even though he has bought and does own the legal title to the article. The dealer's function in selling an article which carries its producers' name and has his advertizing instilled into it to make it self-selling, is more like the function of a postman delivering a letter than a retailer working up or creating a sale on his own reputation as a retailer of integrity.

The manufacturer under the contract system of price-protection only had to have enough capital for his daily, weekly or monthly turnover. His capital was immediately replenished by selling his output to the wholesalers or jobbers who acquired title under agreements which restricted them to sell to retailers at uniform wholesale prices under contracts limiting the retailers to uniform and usually advertized prices to the public.

So long as branded articles are protected against competition by letters patent, their prices are based on the competition of conflicting desires. If a certain type of patented razor is regarded as overpriced at $5.00, the public will purchase a different make at $1.00, or at $2.00, or at 50¢.

As soon as patents expire on the popular types, the ordinary law of market competition begins to regulate the retail price. If the original patentee tries to hold his price too high, other producers will make the same article under different trademarks at lower prices. In the very week during which the patent on a well known type of razor expired the price fell away from $5.00 to below $1.00.

Competition Within and Between Systems.

As before stated, these three systems were operated concurrently through independent wholesalers and retailers. Some goods flowed anonymously at free prices from producer and wholesaler to retailer and public. If different dealers charged different prices the public assumed it was because of different qualities. There was no criterion of value. The same wholesalers and retailers were simultaneously handling other goods on a consignment or agency basis. At the same time these dealers were handling branded or trademarked goods on vertical resale price contracts.

If branded or consignment goods tended to be too high in price, the public turned to loose, bulk or unbranded goods backed by the integrity of the dealer, the producer being unknown. If consignment or agency goods sold under trademark were too expensive, the public turned to the next competitive article sold under the less expensive contract system. Competition between different brands under the vertical contract system was very keen because it was directly between producer and producer. The independent wholesaler and retailer were neutral channels of distribution, like post offices. They carried all makes of goods under different trademarks and under different prices.

Witness the tremendous price reductions and economies that have gone to the public through the expert but price-controlled competition between different producers of motor cars in past years. Rigid price-maintenance intensified rather than reduced the real competition between producers each controlling the price on his own trademarked car.

As to branded goods in the lower price levels, the competition was of the showcase or display shelf variety. A customer walked up to a counter and there on display was an entire line of razors from every important factory in the world, each distinguished by its own brand or trademark. There also were other standard makes of cutlery that were unbranded. Each producer was controlling his own trademarked products like regimented soldiers. If one make of article was overpriced at $5.00, customers turned to one just as good at $4.00, or if someone could make a satisfactory article at $1.00, all of his competitors had to meet that price or lose business.

Perhaps the outstanding example of the operation of the branded or vertical price contract system was the Ingersoll watch. The first watch cost approximately $52,000.00 to produce. The retail price was regulated by the ability of the producer to distribute the goods inexpensively throughout the country. So long as the total demand equalled only a few thousand watches per day, the goods could not be produced to sell at less than $5.00 or more per watch, but eventually the manufacturer increased his good-will and his distribution to the point where through the branding of the watch as an Ingersoll Dollar Watch and by having practically 100% distribution throughout the retail trade and by prominently advertising the Ingersoll name and the Dollar price until one was synonymous with the other, sales resistance was so completely broken down that it was pos-

sible to market many thousands of watches per day and thereby to sell this $52,000.00 watch at a One Dollar price, which included a fair profit for the producer, the wholesaler and the retailer, and which was also fair to the consumer because no competitive producer could better it.

This whole system pivoted on the sanctity of the vertical price contract. If any dealer could lawfully cut the price of $1.00, he would thereby mark down the retail price not only on his own stock but also on the stock of all other retailers in that market at that time, thus demoralizing the whole system, because other dealers who could only make a fair profit at the $1.00 price, would then put the goods under the counter and tell customers who expected to buy them at the cut price that they had none in stock. The dealer preferred this course to quarreling with the customer who expected to purchase a $1.00 article at a cut price.

These three smoothly working systems of merchandising, with competition operating between the three systems and also within each of the three systems, and all three systems working through independent competing wholesalers and retailers is still in existence in every important country in the world excepting only the United States and to a lesser extent in Canada.

The three competing systems do not work toward monopoly or the creation of chain stores, catalogue houses, price scapers and the like, but tend always to preserve the independence of one-store merchants.

These three systems were in existence and operating smoothly throughout the United States until around the turn of the present century.

Patent Infringement Price Systems.

New and high-priced patented goods could always lawfully use the consignment or agency system of maintaining prices, but the excessive burdens and expenses of that system, consequent upon the producer having to furnish not only manufacturing capital but jobbing, wholesaling and retailing capital as well, forced the producers of new and patented specialties, around the latter part of the last century, to stamp the retail prices on their goods and to pass title subject to restrictions which purported to convert price-cutters into infringers of the patent. The lower federal courts upheld the legality of these retail price systems based on patents in a series of cases.

There was nothing pernicious about this patent price system. It was inexpensive and abuses were prevented by competition between rival makers of patented articles or the competition of conflicting desires. The very success of the Gillette Safety Razor Company in holding the $5.00 price on its patented razors brought in a flood of competitive razors at every price range from $5.00 down to 25¢ for a very good razor made by Mark Cross of London.

The principal effect of a refusal by the courts to enforce this patent price system was to force the same articles onto a consignment or agency system with an added burden of expense falling ultimately on the public.

The Copyright Price Case.

The success of the patent infringement price system in the lower Federal courts aroused the emulation of publishers. Bobbs-Merrill Company published a book called "The Castaway" containing a notice that anyone who sold it at retail for less than $1.00 would be held as an

infringer of the copyright. The Constitution prohibits cruel and unusual punishments, and the defense of an infringement suit is an onerous thing.

The *Bobbs-Merrill* case came to this court (*Bobbs-Merrill Co.* v. *Straus,* 210 U. S. 339, 28 Sup. Ct. 722, 52 L. Ed. 1086) which held in effect that the price-cutter was not a copyright infringer. The most astonishing thing about the decision was that this court referred to the fact, without either comment or condemnation, that R. H. Macy & Company was buying the "Castaway" in the open market at $1.00 per copy for the purpose of re-selling it at 89¢ a copy, a clear loss of 11¢ per copy on the purchase price, to say nothing of the approximately 30 or 35% overhead cost which represented a pure loss to R. H. Macy & Company in carrying out the expensive transaction.

It is safe to say that the old Oil Trust in its most predatory days never purchased oil at $1.00 a barrel for the purpose of selling it at 89¢ a barrel to injure its little competitors. It relied mostly on railroad rebates.

Secret Formula Price Protection.

Then came the crucial case of *Dr. Miles Medicine Company against John D. Park & Sons* (220 U. S. 373, previously referred to). The majority and the dissenting opinions in that case show that the argument at bar was principally concerned with establishing that the Dr. Miles branded or trademarked product in issue was made under a secret formula which was like unto a patent and thereby gave the producer the right to restrict the retail price on some sort of an infringement theory of projection of monopoly.

The court disposed of that argument pretty much as it

did the copyright argument in the *Bobbs-Merrill* case and of the patent infringement theory in later cases. (*Bauer* v. *O'Donnell*, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041; *Straus* v. *Victor Talking Machine Co.*, 243 U. S. 490, 37 Sup. Ct. 412, 61 L. Ed. 886; *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502, 37 Sup. Ct. 416, 61 L. Ed. 871; *Boston Store of Chicago* v. *American Graphophone Co., et al.*, 246 U. S. 8, 38 Sup. Ct. 257.)

Trademark Price Protection is Either Good per se or Bad per se. There is no tenable middle ground.

Grave economic maladjustment flowed from this epoch-making case of *Miles* vs. *Park* due to the fact that this court recognized the validity, under the Sherman Anti-Trust Act, of the combination-consignment, agency or boycott system of standardizing retail prices but condemned the resale price contract system and refused to protect it by injunction.

It is earnestly submitted that wholesale and retail price standardization on branded or trademarked articles is either good or it is bad. If it is good, it is good whether it is established by vertical price contracts or by consignment, agency or boycott combines or by setting up wholesale depots for feeding the retailers from hand to mouth so as to maintain prices by cutting off the supplies of price-cutters. (*U. S.* v. *Colgate*, 250 U. S. 300, 39 Sup. Ct. 465, 63 L. Ed. 992; *U. S.* v. *A. S. Schrader's Son, Inc.*, 252 U. S. 85, 64 L. Ed. 471; *Frey & Son* v. *Cudahy Packing Co.*, 256 U. S. 208, 65 L. Ed. 892; *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441, 66 L. Ed. 307.)

On the other hand, if retail price standardization on branded or trademarked goods is bad *per se*, then it is just

as bad when established by a boycott combination of consignment agents as by a system of vertical contracts. The result is the same so far as the public is concerned except that the agency systems are more expensive than the vertical contract systems.

The Sherman Act condemns both contracts and combinations in unreasonable restraint of trade. It makes no distinction as to whether the restraint is effected by combining together twenty-one thousand wholesalers and retailers as consignment agents of a common principal or by combining the twenty-one thousand dealers by means of vertical contracts.

The importance of the rule against alienation, as a trade fact, is truly chimerical so far as special fungibles like trademarked commodities is concerned. The public seldom knows whether title has passed from producer to dealer or not, and cares even less. The consignment system is much more cumbersome and monopolistic than the contract system and the public foots the bill.

The only difference between the contract, the consignment and the refusal of sales systems is wholly in favor of the contract system. The vertical contract combination can only be effected on goods which are branded or identified as coming from a common source by bearing a unique trademark. This vertical contract system is inexpensive, rides lightly on the pocketbook of the public, is highly competitive and invites little producers to operate because they only have to control manufacturing and advertizing capital and do not have to supply the vast amounts of capital required for consigning the goods to twenty-one thousand dealers with retention of title.

This good system of standardizing retail prices on

trademarked commodities by vertical contracts was condemned by this court in the *Miles-Park* case.

But the same court in the same case recognized the unquestioned legality of the system of maintaining retail prices *on either branded goods or unbranded goods* by a vast combination of agents on a consignment basis or by the use of chain store outlets, such as the shoe manufacturers, oil companies, and the like, employ.

The Effects of the Miles v. Park Case.

The direct and unavoidable result of the decision in the *Miles* v. *Park* case was that large manufacturers with sufficient amounts of capital to establish their own chains of stores, agencies or service stations or to consign their goods to thousands of retailers, took steps lawfully to protect the retail prices on their branded and unbranded goods by boycotting or withholding supplies from price-cutters through combinations of many thousands of selected dealers, but the little producers who were without sufficient capital for consignment purposes had to sell out or merge with large concerns or else have their sales cut down and their business injured by price-cutting.

The independence of the wholesalers was likewise affected by the *Miles* v. *Park* decision. Some of the big manufacturers took over the wholesale functions on their goods. The great collar and shirt manufacturers established wholesale depots in all of the principal retail markets, thus injuring the independent wholesalers and enabling the manufacturers to feed the retailers on a hand-to-mouth basis, so that anyone who cut prices today could get no more goods tomorrow.

The effect on the independent retailers was the most

disastrous of all, because the very forms of monopolistic or below-cost price-cutting which were condemned in the oil cases were legalized and approved in the *Miles-Park* case, and this thus legalized form of price-cutting has been just as disastrous to the independent retailer as it formerly was to the independent oil operator.

Miles v. *Park* started the country into a process of economic regimentation which, unless checked, must finally evolve into state socialism or something worse.

The effect on the public was bad, not only because merchandising gravitated to chain stores and metropolitan centers, but because the cost of doing business rose sharply, and the public had to foot the bill.

Combination Price-Cutting is Bad in All Its Forms.

Price Manipulation.

This court, in *Standard Oil Co.* v. *U. S.* (221 U. S. 1), severely and properly condemned the practice of the Oil Trust in selling oil low in competitive territories and high in non-competitive. That was recognized as price trickery or combination price-cutting. The Trust could only sell oil low in the "fighting" territory because that territory was combined in ownership with other territory in which the Trust was charging too much due to a condition of previously achieved monopoly. The small independents, having no combination of high price monopolized markets to counterbalance their losses in low price competitive markets, soon were forced to the wall. This might be regarded as checkerboard price-cutting.

A chain store is merely a checkerboard of markets drawn out into a chain under one ownership, not different in prin-

ciple from the checkerboarded markets of the Oil Trust. A chain system can convert first one store and then another into a "fighting store" to "meet local competition" and the nearby independents soon fold up because they have no distant stores in non-competitive territory from which to draw monopolistic profits to carry them through a price war in the competitive territory.

A department store is merely a chain of stores located under one roof, each handling a different kind of goods. A department store is admirably adapted for the same type of combination price-cutting which created the Oil Trust and the predatory chains. The department store successively eliminates its various one-store competitors in price wars. The china department, for example, is converted into a "fighting" department "to meet competition". Losses in the chinaware department are offset by profits from departments which have previously met and eliminated their local competitors. Single unit stores specializing in chinaware, having no other departments to offset their losses on chinaware, are soon eliminated.

Single unit price-cutting stores depend on their ability to play certain loss-leader-lines against higher priced lines of other goods. Bargain hunters are drawn into the city or downtown by flaming headlines and radio appeals. Then high-powered salesmen manage to sell them as little of the loss-leader goods and as much of the long-profit goods as possible. It's all very expensive merchandising but the public foots the bills and thinks it is being economical.

"Economies" Which Increase the Cost of Doing Business!

During the orgy of combination price-cutting which was legalized and stamped with judicial approval by the judgment of this court in *Miles* v. *Park, supra,* the cost of doing

business has steadily mounted from around 10% to around 30% of gross sales.

Price-Cutting Frequently Condemned.

Price-cutting on oil was condemned in *U. S.* v. *Standard Oil Co., supra.*

Price-cutting on railroad tickets was similarly banned in *Bitterman* v. *L. & N. R. Co., supra.*

Price-cutting was eliminated, in so far as refusal to sell goods to the price-cutters could eliminate it, by the judgment of this court in *U. S.* v. *Colgate, supra.*

Price maintenance effected by a chain of stores was legalized in *U. S.* v. *American Tobacco Co., supra,* by recognizing the United Cigar Stores Company as a lawful chain store device.

Price-cutting on Mazda lamps was eliminated by the judgment of the court in *U. S.* v. *General Electric, supra,* which upheld the legality of the consignment system of combining many thousands of dealers as agents of a common principal in order to refuse supplies to price-cutters.

This long line of wise decisions (a) against the practices of predatory price-cutting on oil by a combination of monopolized and fighting markets, (b) of protecting railroads against the impossible ordeal of trying to sell transportation at a high price when scalpers were offering the same transportation in the same market at a low price, (c) assisting those collar and shirt and other producers who were financially large enough to project their control over goods already sold by establishing their own local wholesale depots and thus keeping their dealers on a hand-to-mouth basis to prevent price-cutting by refusing supplies to the price-cutters or anyone who tried to supply them, and (d)

legalizing the enormous combination of sales agents by which the General Electric Company prevents all price-cutting on its Mazda lamps (both (c) and (d) constituting Ulysses' bows which small capital producers could neither hold nor bend), is only marred by the judgment of the court in *Miles* v. *Park, supra,* which, in effect, legalized and approved the principle of price maintenance on branded goods when erected and maintained by a maximum capital boycott combination of agents bound to a common principal, so that no title to the goods passed until the final sale to the public (*i. e.,* the General Electric Mazda Lamp plan) but legalized and approved the practice of loss-leader or combination price-cutting by refusing to approve the small producer's and small dealer's minimum capital device, namely, the vertical resale price contract which is legalized and protected in the California Act here in question.

Price-Cutting Chain Organizations Grew Apace.

For a few years after the decision of the Court in *Miles* v. *Park, supra,* national manufacturers of trademarked goods whose products were handled in approximately 100% of the retail stores and who thus could not select a mere twenty-one thousand or so elite agents for a consignment or boycott system of retail price protection, endeavored to combat the chains by serving as champions in the movement to have the Federal Congress remove the barrier which this Court had raised against the vertical resale price contract system in the *Miles-Park case.* No one has ever claimed that it would require a Constitutional Amendment to remove that barrier. The amazing and disastrous results which have flowed from it, show that the barrier ought never to have been raised at all—at least unless all forms of price-maintenance were to be equally condemned.

The chain stores and the other combination price-cutters grew so fast and large under their privilege of legalized combination price-cutting that they drove many independent stores to the wall and reopened them as chain units. They so hypnotized the public into the belief that the high-priced stores were selling goods cheaper downtown than their little competitors uptown or out in the country could do that the producer champions of the contract-price-system soon faded quietly into the background and later began to curry favor with the big chain store systems by making them advertising, quantity discount and other allowances which in effect gave preferential discounts or secret rebates to the big chains and price-cutters as against the little one-store dealers.

In short, national producers who could not protect their trademarked lines from price-cutting by using consignment systems, chain outlets or refusal of sales devices found themselves selling the chain store systems at prices too low and averaging up their gross receipts by selling the little independent dealers at prices too high.

Maximum Capital Economics.

This differential in purchasing power gave the big chains a further margin of profit to be passed on to the public in further cuts on loss-leader and other lines to hasten the elimination of the small dealers by the big combined ones.

The whole scheme—chains grown bloated on legalized price-cutting and increasing their edge over little competitors by grossly unfair discriminations in buying power, due to their vast size, constituted what may be called *a maximum capital economy.* The concern with a large capital could always outreach and undersell the concern with

smaller capital. Big concerns automatically grew bigger. Little concerns tended automatically to grow smaller.

As a system of evolutionary socialism it was fine. As a system of economic democracy it was rotten.

This whole matter of discrimination as between customers deserving of equal treatment by overcharging the little dealers so as to be able secretly to undercharge the big dealers had all been fought out and settled as railroad policy, but it had to be threshed out all over again in private business with the result that the Clayton Act (U. S. C. Title 15, Chap. 1, Sec. 13, Oct. 15, 1914, C. 323, Sec. 2, 38 Stat. 730) was passed to prohibit discrimination in price as between different customers under similar circumstances.

After the Clayton Act had been whittled down by various legal subtleties, the Patman-Robinson Act (An Act to amend Section 2 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies and for other purposes", etc., approved June 19, 1936, U. S. Public Acts 1936, No. 692, 74th Congress, 2nd Session, H. R. 8442) was passed to deprive wealthy distributers of the secret rebates, allowances and discriminations which they had been extorting from producers at the expense of little purchasers because they had waxed so great on the price-cutting practices legalized and approved in *Miles* v. *Park, supra.*

These developments caused directly by the *Miles-Park* judgment are so contrary to the purpose of the Court and so injurious to producer, dealer and public alike that the Court should take judicial notice of them, or, if they be questioned, they are matters concerning which proof could be supplied if the case be not disposed of by affirmation on demurrer.

Three Legally Forged Weapons for Driving Small Dealers to the Wall.

Here then were three legally forged weapons for eliminating single-store standard-price-retailers and fostering chain stores, consignment combines, refusal-of-sales-systems, and expensive cut-rate department stores, catalog houses, and price-wreckers:

First.—Automobile, lamp, shoe, oil, shirt, collar and other manufacturers and producers with large enough capital resources, cut out the formerly independent wholesalers, retailers and salesmen entirely and established their own autocratically controlled chains of consignment, franchise and sales agencies and refusal of sales systems. This alone caused a devastating change in lines of business formerly open to independent dealers.

Second.—The monopolist's weapon of combination-price-cutting, legalized by the *Miles-Park* ruling in all lines of business where it could not be prevented by the establishment of producer-controlled combines as enumerated above, caused a further elimination of one-store retailers and dealers and a tremendous growth of distributor-controlled chains.

Third.—Sheer size and buying power resulting from predatory use of combination-price-cutting by the chains enabled them to extort discriminations and price concessions from the producers to be used for further price onslaughts against the few remaining small dealers—the whole amazing phenomena having no comparable parallel in countries which permit trademarked price maintenance to be established by legally protected vertical contracts the same as by consignment, agency or refusal of sales devices.

It is earnestly submitted to this honorable court that the result reached in the *Miles-Park* case is untenable in

logic, in law or in public morals, and the trade processes which have been traced show that the principle of permitting price stabilization by expensive agency, consignment, refusal of sales, or chain store, or service station devices, while condemning small producers and independent dealers to the ruthless and destructive effects of price-cutting by refusing to legalize inexpensive resale-price contracts protected against nullification by unfair competition, is practically the largest factor which has upset the economic equilibrium of the country and started us on the maximum capital road to ruin.

If this court shall embalm the *Miles-Park* rule in the 14th Amendment to the Constitution of the United States by declaring against the validity of Section 1½ of the California Act in question, the court will have doomed small producers and dealers to eventual extinction and will have continued to create quasi-trusts (a) by giving wealthy producers powerful agency or ownership weapons of price protection, (b) by giving wealthy distributors and chain stores the monopoly weapon of legalized price-cutting, (c) by encouraging the practice—now unlawful—of secret rebates or (d) of evading the operation of the anti-rebate acts by further combinations of producer and dealer organizations.

The Real Issue.

It is respectfully submitted that the issue presented to this court by the California Fair Trade Act cannot be resolved by recourse to the rule against alienation but must turn on the question whether trademarked price maintenance *per se* is condemned or permitted by the Constitution. If twenty-one thousand Mazda lamp dealers can lawfully

be combined for the sole purpose of preventing a few price-cutters from getting any Mazda goods to sell at cut prices (and this court has held that they can) then nothing in the Federal Constitution can inhibit California from reaching the same result by holding that the same price-cutters can be enjoined as unfair competitors from nullifying a vertical resale price combination of the same twenty-one thousand dealers.

The two methods are both either good or bad. Only economic regimentation or chaos, either or both, can come from endeavoring to hold that one result is good and the other is bad.

Price maintenance on branded fungibles is either good or it is bad. There is no middle ground. It is *per se* either a bad thing, an unlawful restraint of trade, injurious to the public, or else it is a good thing and not prohibited by constitution, statute or common law, and open just as much for the protection of the little producer and publisher by protected contracts as for the big manufacturer and chain store man by regimented agencies.

If price maintenance on branded fungibles is good and in the public interest and not an unreasonable restraint of trade and not an unlawful price-fixing device, then it is just as good when erected on contracts protected against the depredations of strangers as unfair competitors (Secs. 1 and 1½ of the Act in question) as it is when erected on vast maximum capital devices such as refusal of sales, chain agencies and consignments.

The protected contract system is essentially preservative of independent retailers. Destroy the contracts or their protection against nullification by price-cutters and you destroy the independent dealers.

The Three Systems, the Unbranded, the Agency and the Protected Contract Systems, Are Absolutely Essential to a Free Economy.

When a manufacturer puts out a branded or fungible product at an advertised price, he has to take into consideration so many different elements of possible competition, that it is impossible for him to make an unfair price and remain long in business or injure anybody except himself. His price on his special trademarked product must meet five rigid tests. First, it must be such a price as will appeal to the consumer, else the consumer will not buy; second, it must satisfy the distributor, else he will not distribute; third, it must satisfy the manufacturer, else he will not manufacture; fourth, it must be a competitive price so far as all other special brands of goods are concerned, else his competitors will take the business away from him; fifth, it must be a competitive price so far as all unbranded goods are concerned, else the latter goods will sell in its place.

Every price that is made by every manufacturer under these three systems must meet those five tests, and it is a practical impossibility for any manufacturer to remain in business for any length of time if he violates any one of the tests, because any one of those elements can put out of business a manufacturer who insists on an unfair price: The consumer alone can put him out of business by refusing to buy; the distributor alone can put him out of business by refusing to distribute, and in this case the producer's

only recourse would be to hire his own agents; and finally, his competitors under either the branded or the unbranded systems can put him out of business by offering better quality at the same price, or the same quality at a lower price.

Destruction of the Protected Resale Contract System Destroys the Independent Distributor System.

Now, these three competitive and self-checking systems are absolutely dependent for their existence on the enforcement of protected price contracts on special fungible or branded products. If the courts legalize, enforce and protect these contracts there will be three systems. If the courts refuse to enforce these contracts, then in the end there will be only one system, namely, the agency system, and that eventually spells a regimentation which is hardly short of socialism—presenting at least its bad factors without its good.

It is not frequently realized that when the contract system is destroyed, the ultimate doom of the unbranded system is likewise sealed. With these three systems in competition with each other, each different type of goods finally gravitates into that system under which it can be most cheaply distributed. Thus, goods which have been standardized by all makers drift into the unbranded system. Goods which can be sold to the best competitive advantage by the contract system gravitate into that system. Finally, special goods which always require the agency system will fall under that heading.

But when the contract system is struck down, it ultimately carries with it the unbranded system. When the contract system is eliminated, the competitive advantage is thrown in favor of the financially large distributors and the

financially large manufacturers, and when the inevitable result of that competitive advantage, namely, the existence of manufacturers' agencies and of chain stores, occurs, then there is no longer competition either in branded goods or in unbranded goods and these plutocratic distributor's and producer's systems tend to merge. So long as the independence of small retailers is preserved by means of contracts, they can compete with each other in the sale of unbranded or bulk goods and in the selection of different kinds of branded goods, but when the law has forced those independent distributors to become hired agents of great manufacturers or chain-store systems, then there is no longer price competition in either the branded or the unbranded goods. This is a very serious argument in favor of the validity of Section 1½ of the California Act here in question for checking the present alarming tendencies toward vast aggregations of capital for manufacturing and distributing goods, with their tendency to merge. If independent dealers are protected against predatory price-cutting they will continue to exist; otherwise they will be supplanted by various kinds of chain systems.

Just as the destruction of the contract system means the ultimate destruction of the unbranded system, so the enforcement of protected resale price contracts on special fungible products means the existence of the unbranded system, because the contracts leave the independent distributors free to buy and sell different branded and unbranded products in competition with each other.

Surely, if the court in the *Miles-Park* case had realized the full effects of its decision, if it had realized that the destruction of the contract system meant the ultimate destruction of the unbranded (or independent retailer) system, its decision would have followed the line of the minority rather than the majority opinion.

California has elected to retain the three competing systems which depend upon the preservation of free, independent, one-store dealers by means of resale contracts protected against unfair competition. The 14th Federal Amendment does not prohibit this.

California has elected to eliminate those forms of predatory price-cutting which injure or destroy small dealers and which cannot be prevented by setting up lawful but expensive or maximum capital systems of agency, consignment or refusal of sales. In short, small capital producers and small or one-store dealers are permitted to employ the protected contract system, and it is not seen how the 14th Amendment, which concededly does not prohibit the expensive agency, consignment or ownership systems, could possibly prohibit the inexpensive protected contract system.

The Act Relates to Special Fungibles.

Why Price-Protection Is Necessary on Trademarked Goods.

From the earliest times the Roman and other systems of law have recognized the clear distinction between fungibles and non-fungibles.

The Century Dictionary and Encyclopedia defines a fungible as follows:

"Fungible . . . a. and n. . . . .

I.a. Capable of being replaced by another in respect of function, office or use.

II.n. In the Civil Law, a thing of such a nature that it may be replaced by another of equal quantity and quality; a movable which may be estimated by weight, number or measure, as grain or money."

Horses, or cows, of varying individual merits, are examples of non-fungibles. If sold or borrowed, the delivery or return of the particular animal is required, and no substitute would be regarded as fungible or just as good. Such articles can sell at varying prices at the same time because each unit has an individual value.

Fungibles are dealt in by weight, number or measure but non-fungibles are dealt in by individual unit on a sort of *sui generis* basis.

Articles produced under a trademark or brand are by their very nature what may be called *special fungibles.* A new book of a certain edition or a new Ford motor car of a certain year's model and type is precisely fungible to all other new books of that edition or new cars of that model and type. All these Ford cars are as nearly alike as the processes of modern manufacture can make them. A customer chooses his model and type from a sales sample in a show room. He does not expect, without special contract, to receive the car he inspects, but merely another car like or fungible to it. So with Ingersoll watches, Squibb's Aspirin, or Gillette Razors. All these articles are made as identical in design and quality as possible. Each one is fungible to its fellows under the same trademark or brand.

Many and various other examples of modern special fungibles can be given, and it makes no difference whether the value lies in the thing itself or in the service or value it represents. Thus a share of Steel Corporation stock of a certain class or grade is fungible to all other shares of the same corporation of the same class or grade. A railroad ticket issued for a certain trip of a certain class over a certain railroad between certain points is fungible to all other tickets of the same road for the same ride. So with

theater tickets to a certain performance for a certain night. The price groupings are based on fungibility.

Postage stamps of a certain issue for a certain amount are fungible to all other stamps of the same issue and denomination.

Books of a certain publisher under his imprint and of a certain issue are fungible to all other books of the same issue under the same imprint.

The Fair Trade Act in question relates not to non-fungibles—not to horses, cows, bulk potatoes or loose milk, but merely to things the units of which are made fungible or standard to each other by bearing "the trademark, brand or name of the producer, owner, grower, baker, maker, manufacturer or publisher."

The uniform price for trademarked goods is dictated by their fungibility and by the so-called law of market price which is formulated as follows:

There Can Be Only One Price for the Same Thing in the Same Market at the Same Time.

This phenomenon is called a law because it always operates due to the fact that no sane or normal seller will accept any price higher than the highest price offered for the thing he is selling in that market at that time, and, similarly, no sane and normal buyer will pay more than the lowest price at which the thing he wants is offered at that time in his market. Moreover no trader will submit to being undersold in the same market on the same article at the same time with the same kind of customers.

The same things may have different prices at the same time in different markets, or in the same markets at different times, or different prices may prevail for different makes of similar things in the same market, but where (a)

the things are the same (b) the market is the same and (c) the time is the same, then only one price can prevail because no seller will accept less and no buyer will offer more.

Sometimes markets may differ in size. People in shopping for one kind of thing will not go further than the corner store but with other things they will travel for miles. The market for one thing may be geographically small and, for another, large. But whether large or small the market for each thing is a relatively definite area, and in that area that thing will fetch only one price at a certain time, if its absolute fungibility is attested by the trademark or brand of the producer.

The act in question, therefore, is limited by its terms, to things which, because their fungibility, their sameness of quality and make, their standardization of value, is attested by the trade-mark, brand or name of the producer, can sell only at the same price in the same market at the same time, and the real and substantial dispute between the plaintiffs and the defendant is whether the uniform price at which plaintiff's goods whose fungibility is attested by the trade-mark, must necessarily sell at a certain time in the market, shall be a price set by the brand-owner or shall be set at this level or that by competition between different dealers selling the trademarked goods at prices dictated by the principle of taking losses on some goods to lure customers who can be overcharged on other goods of unknown value.

The producers do not care what prices the dealers charge for non-fungible goods, but they insist on their right by contract to stipulate the price at which different retailers shall sell trade-marked fungibles.

Price-cutting or unregulated competition in the resale of branded fungibles injures the producer in either or both of two ways:

a. Where the article is expensive, like a motor car, and must be sold by specially trained men, price-cutting demoralizes the sales force as will presently appear.

b. Price-cutting also interferes with the wide physical distribution of trademarked articles, because many dealers are unwilling to handle or push an article which is being slashed by the price-cutters.

It is because of the grave damage done to the business of the trademark or brand owner and to the small or independent dealers and to the public by reckless price-cutting that various legal means have been worked out to prevent unregulated price competition in branded articles. A few examples of these plans for protecting fungibles against injurious price-cutting will be helpful in clarifying the subject.

Prices Are Maintained on Newspapers and Magazines Which Are Special Fungibles.

The resale prices on newspapers and magazines are not cut. The prices are always rigidly maintained without injury to the public. If, for instance, the publishers of the New York Times were to permit retail price-cutting, that paper would vanish off the regular newsstands almost over night. Price-cutting stores would offer the "Times" free to each purchaser of such and such a quantity of other goods, and the newsdealers who depend on regular profits, would be able to sell so few copies in competition with the gift or premium price-cutters that there would be no incentive to carry the paper in stock for sale in the regular way. Therefore the newspapers and periodicals maintain a rigid resale price policy and any dealer who sought to offer a three-cent paper for one cent would instantly find

his supplies cut off. Owners of trademarks on national fungibles grow ironical when they read editorials denouncing the Fair Trade Act in metropolitan newspapers which cater to large price-cutting interests and yet maintain the strictest resale price policy on their own newsstand sales, standing prepared to cut off the supplies of any newsdealer so iniquitous as to cut the prices on their fungible product.

Prices Are Maintained on Postage Stamps Because They Are Special Fungibles.

The Federal Post Office Department finds nothing oppressive to the public in the maintenance of a strict resale price policy on postage stamps. Title 39, Chap. 9, Sec. 363 (R. S.) § 919 enacted by Congress prohibits the sale of postage stamps except at par. The Post Office knows that if price-cutters were permitted to give away stamps as premiums, the wide distribution of stamps in stores and the like would vanish. No wise storekeeper would care to charge for stamps which the price-cutters were giving away as premiums to lure customers down town. And so the little shopkeepers, rather than run the risk of being regarded as overchargers, would simply cease to carry stamps at all.

If price-cutting is such a fine policy on other fungibles why does not Congress permit it on stamps? Price-cutting would harm the sale of stamps and it harms the sale of other trademarked articles in the same way.

Other Special Fungibles Are Price-Protected.

Nor are the problems of salesmanship any different when applied to life insurance or sales of stock or railroad tickets, than when automobiles or electric motors are in-

volved. Highly trained salesmen are needed in the sale of insurance. Such corps of men devoting their lives to the sale of insurance could never be maintained if price-cutting were permitted. One salesman would not take the time to work up a sale of a certain policy in a certain company if at the last minute a price-cutter could steal the sale by splitting his commission with the insured on the same policy in the same company.

Therefore, the various States have enacted criminal statutes to prevent the cutting of prices on insurance. All of the policies of a certain type in a certain company are fungible to each other—and only one price can be maintained for each type of policy of the same insurance company in the same market at the same time. Price-cutting or premium-splitting would demoralize the ranks of insurance men and injure the companies and the public as quickly as it demoralizes the retail dealers who sell branded or trademarked products or the railroads where price-cut tickets are concerned.

Stock exchange brokers and advertising agents likewise are offering what may be described as a fungible type of service in the purchase or sale of stock or advertising space. Their commissions are rigidly fixed so as to prevent price-cutting demoralization or competition based on price-inducement rather than service.

This Court Has Previously Protected Lawful Contracts Against Injury by Unfair Competition.

Railroad tickets may be called personal contracts but they are also physical commodities and were once dealt in freely by many dealers known as ticket scalpers. It was recognized as axiomatic that one ticket for a certain passage

on a certain railroad is fungible to another ticket for the same ride. The law of market price made it quite impossible for a railroad ticket office on one side of the street to charge a scheduled price for a ticket where precisely the same ticket and ride was being sold across the street at a cut price. In this instance it was the Supreme Court itself which applied the remedy of protection against unfair competition to this impossible situation. No statute was enacted as was done to stop price-cutting on insurance. The Supreme Court made its own statute. It issued its injunction (*Bitterman* v. *Louisville & N. R. Co.*, 207 U. S. 205, 222, 224, 52 L. ed. 171) against the transportation sold by price-cutters.

The theory of this equitable remedy as worked out or invented by a court of equity was precisely the theory embodied in the Fair Trade Act in issue. The court found that the contracts between the railroad and its passengers were lawful contracts and that the ticket scalpers as strangers were nullifying the contracts and competing unfairly with the railroads by dealing in price-cut return tickets—and the court enjoined and suppressed the scalpers.

Books Are Special Fungibles Controlled by the Law of Market Price.

Books of the same publisher and edition are just as fungible to each other as are tickets of the same railroad for the same ride or identical policies in the same insurance company offered by one agent at a cut-price to take a sale away from the salesman who really worked it up.

Surely there could be no keener competition than that between the publishers of different books or the makers of

different motor cars but such competition has always been on a strictly maintained retail price basis. Defendant may try to confuse this fact by claiming that allowances on used cars are like price-cuts, but the truth is that if one salesman works up a sale for a certain car on a certain used car allowance, no other salesman of that company would be permitted to steal the sale by offering a larger used car allowance on the old car.

Motor cars are sold strictly on a basis of no competition between dealers handling the same make of car. This is no more truly to be regarded as a restraint of trade or as a form of "price fixing" in violation of the constitution, than are the maintained retail prices on books, newspapers, periodicals, or postage stamps, or the standardized and uncutable commissions imposed on stock-exchange, insurance or other brokers.

In the case of insurance and automobiles the competition is keen. Each company is competing with other companies, but the salesmen are prohibited from cutting prices or commissions as between other salesmen of the same company.

Surely a department store or other local price-cutter, under its theory of being a purchasing agent for the public, should no more be permitted to cut prices on trademarked fungibles than are the insurance agents, stock brokers or ticket scalpers or others who are dealing with fungible values or services of various sorts. If stock brokers, insurance agents or branch post offices were permitted to cut prices or to make prices or commissions depend on the competition of the market, there would be just as much demoralization, trickery and restraint in these lines as now exists in the distribution of branded or trademarked fungibles, at least in those lines which cannot be pro-

tected by expensive consignment, agency or refusal of sales systems for boycotting the price-cutters.

There is nothing either new or strange or oppressive to the public in systems of resale or retail price-standardization as applied to various fungible values, and these are not regarded as prohibited or unconstitutional forms of "price fixing".

On the contrary, price-cutting as applied to fungible values like brokerage, insurance, postage stamps, railroad tickets and the like has been recognized as an unmixed evil to be suppressed by use of the police power through equitable injunction or by statute. The defendant here has no more vested right in the privilege of price demoralization on branded fungibles like Max Factor products, than did the ticket scalpers have in the privilege of selling tickets at cut prices. No more property was taken in one case than in the other.

On the case as pleaded the defendant admits that he bought the trademarked goods in issue after the contracts were made and with knowledge of the restrictions on his alleged right of resale imposed by those contracts, if the lawmakers acted within their power.

In the instances referred to it was found that indiscriminate price-cutting on fungible values was demoralizing and uneconomic. If permitted it would drive postage stamps out of general circulation and confine their sale to branch post-offices. It would drive newspapers and periodicals off the newsstands of all but those owned by great chains and monopolists.

Price-cutting on taxicab fares would soon drive the independent taxicab off the streets. The insurance business could not long survive a policy of premium price-cutting. Only tricksters would dare embark in the business.

Legalistically or metaphysically considered, these various businesses with their standardized price systems could be sorted this way or that under the principles of private contract, public regulation or the police power but they are all good examples in an economic sense of the same thing, namely:

> the inexorable operation of the law of market price on a fungible thing, value or service.

The feature of fungibility is present in every instance and that means that there can be only one price for the same thing in the same market at the same time. If one agent cuts the price of a certain "policy" on insurance in a certain company in a certain market at a certain time, other agents must meet or better that cut or be driven out of business.

Foreign Practice.

In matters of trade, business and distribution, the leading European nations have had centuries more of experience behind them than we have had and they have long adopted and maintained the practice of price-standardization of fungibles not only in all the lines of business and practice previously mentioned but in the distribution of merchandise under trademark or brand.

In England, France, Germany, Spain and other important countries, cutting the prices on trademarked, branded or other special fungibles in order to attract trade in the identical things away from other dealers is banned. The cutting of a price on a trademarked article or so-called "proprietary" is a police court offense in some countries. In Spain by statute, the trademark owner merely stamps his price on his goods and it follows the article through all the

channels of trade. The same result is reached in effect elsewhere. No restraint of trade results.

In England there is a well-established association known as Proprietary Articles Trade Association, called for short, "P. A. T. A." Owners of trademarks or brands are eligible to membership and if a dealer cuts a price on one proprietary all the other members legally can refuse to sell him any of their goods. This is apparently a substantial extension of the forms of "boycott" price maintenance which are legal in the United States but it does not in practice work a restraint of trade. It merely bans an injurious practice. No prices are cut and the little dealers have not been driven out of business by an unhealthy growth of retail chains on one hand and producer chains on the other or by general price demoralization.

We cite this instance of the British P. A. T. A. principally to show that in foreign practice it has long been demonstrated that there is nothing of a monopolistic, restraining or oppressive character involved in the practice of permitting the producers of proprietaries, trademarked or so-called branded articles rigidly to control the retail prices on their own fungible goods. Each branded article is in the keenest possible showcase or other competition with all the other products. Carter's Little Liver Pills, for example, are always in strong competition with other remedies.

The price set by the producer on his proprietary or fungible product must always meet rigid tests which absolutely insure the maintenance of fair competitive conditions.

Names or brands do not constitute a monopoly. Everyone can choose some kind of a trademark and embark in the manufacture and sale of a branded product, and whenever the branded fungibles in a certain line tend to be

overpriced, the public will quickly turn to bulk or unbranded or competitive substitutes.

The chief difference between foreign and domestic trade in proprietaries or fungibles is that abroad the costs of retailing have not soared up from approximately 10% to approximately 35%, as they have in the United States in certain lines under the malign effects of indiscriminate price-cutting on trademarked or loss-leader goods by great chains and department stores which are draining the economic life blood of the outlying districts down into the great metropolitan centers.

The large price-cutters like to talk about handing on the "economies" of their gigantic downtown stores with large real estate investment, high rents, appalling taxes, expanded wages, tremendous overhead and fantastic advertising, to the consumer, but the plain every-day facts are that when people used to give their fair volume of purchases to their little independent local tradesmen, the cost of doing business in many lines was as low as ten cents on the consumer's dollar, whereas the demoralizing practice of using standard brands as "loss leaders" to mislead the public about values and to lure them away from the local stores with their low rents, small taxes, inexpensive clerk hire and modest circulars and attract them down to great metropolitan shopping centers, has added a sheer twenty-five per cent. onto the cost of doing business, and the public must pay this increased burden.

Loss-leader price-cutting on trademarked or branded articles gives people a false idea that their local dealer who is charging the regular retail price is overpricing the proprietaries and other goods as well. The fantastic price manipulation downtown (price-cutting recently sent the

price of the Modern Library regularly sold at one dollar down to 9 cents) since the turn of the century, has skimmed away all the cream of the trade from the low-cost neighborhood and country stores. Shrinking volume of trade has left them still with their old expenses of rent, taxes, etc., but has driven up their cost of doing business by imposing all their expenses on only those comparatively few purchases which a deluded public still makes at the independent neighborhood stores. By driving up all costs of doing business, the price cutters of trademarked goods are enabled to slide their own high prices onto a public which falsely believes it is a beneficiary of new and modern economies.

Those mounting costs of doing business accompanying the practice of using trademarked, standard or fungible values as loss-leaders are the answer to any claims of economies based on price-cutting, and if these plain economic facts are not conceded as matters of general knowledge on this hearing, the case should be remanded for general proofs—so as to put flesh and blood on the bare legal skeleton presented by the demurrer—before, in short, the Court should assume *in vacuo* the unconstitutionality of an act aimed at undeniable economic evils.

Abroad, where price-cutting and use of proprietaries as loss leaders is not permitted, the total volume of business is still fairly distributed. The local stores still have both the cream and the milk of the business instead of being left to cater merely to the skimmed milk of the trade, and the cost of doing business has not risen to towering heights through fantastic methods of advertising and price manipulation of standard values.

Bargains may be had abroad but not in trademarked or fungible value goods, and great metropolitan, chain store

and catalog advertisers and price-cutters have not been permitted to wreck the national or standard system of producing branded articles and distributing them everywhere for sale at standardized prices through independent or one-store dealers.

Foreign Practice as to Price Maintenance on Books.

The book trade in its argument for price maintenance or branded articles has back of it the experience of over a hundred years in Europe, where one country after another has adopted the uniform price method—Germany, all the Scandinavian countries, France, Holland, Czechoslovakia, Italy, Spain. The last country to adopt the plan was Great Britain, in 1899.

All of the countries look upon price standardization as the only possible basis for national distribution of books. In England it is regarded as the cornerstone of the industry. When the new nation of Czechoslovakia was organized, a complete set of rules for the industry was outlined and approved by the government, and the whole basis of this was uniform prices throughout the country, with no increases and no decreases from the level set by the producer. England was converted to the idea after a half century of argument and has never wavered in its belief in its importance and social significance.

It is to be noted that no one in this country has ever considered that book prices in Europe were high because of uniform prices; in fact, students of the commerce in books believe that the wide distribution made possible by confidence in the price level brings about the distribution that makes Europe greater users of books per capita than America.

The retail or newsstand prices of newspapers are absolutely fixed both in America and abroad. Many magazine prices are absolutely uniform, and the cutting off of supplies has always proved an easy way to discourage price-cutters. Magazine subscriptions are fixed by the publisher and lower prices are offered only in such cases as advance subscriptions.

Society as a whole benefits from uniform or standardized prices. Textbook prices are fixed by contract with the states which buy them. Such contracts provide that prices paid by one state shall be no greater than those paid by other states and certainly never any less, because that would infringe the contract binding in other states. Thereby uniformity is accomplished but competition in real book values, namely, in the contents, is stimulated, just as it is with newspapers and magazines.

In low-priced books, far and away the best purchase and the greatest book value available is that made possible by the fixed price system of the ten-cent stores. They do not produce their own books but they would cease to handle them if anyone cut the price elsewhere below ten cents.

Without the huge distribution through these great outlets the ten cent price on books as fine as these ten cent books are, would be im· ossible.

The same is now true of the books in the twenty cent level.

This is one indication of the fact that society gains by uniformity of price which makes possible wide distribution. Wells' "Outline of History" was another example. It was published at first in two volumes at $10.50. Some price-cutters sold this edition at $7.79, and argued that this was a great saving to society, but it was the subsequent sale of the book at a uniform price that permitted the issuing of a $5 edition, and that made way for the final $1 edition, which was

one of the greatest bargains ever offered the public. It was not price cutting from $10.50 to $1 but increased market that permitted the lower prices. There is where society's interest really lies.

The Act Is a "Trade Act" Rather Than a Property Alienation Act.

Defendant apparently sought to present the case below as though the Max Factor products he owned were private property of a nature not affected with a public interest and that the Legislature had endeavored to prevent him from selling his property except at a price arbitrarily fixed by other dealers.

This is not the case. The statute in question regulates the trademarked goods only while in the regular channels of trade. Defendant can close out his line of Factor products at any time, for any reason and at any price he pleases to charge.

All that the Fair Trade Act does is to regulate trademarked products in the regular course of trade. It is a trade-regulating act rather than an act changing the right of alienation of property after it has left the regular channels of trade. The Act has to do with dealers buying goods for resale, and the goods are restricted only so long as they are regularly in trade. Even a regular dealer under contract can convert the goods into ordinary property, so far as he is concerned, at any time by a close-out sale or under a court order or when the goods are damaged or deteriorated.

The Legislature when permitting the regulation by contract of a certain class and type of identified goods only so long as they are being purchased for resale in

trade, the goods being free as soon as any trader wishes to close them out, is not enacting a statute fixing the alienation rights of property in general. Defendant seeks to free himself, not his goods. He wants to sell at close-out prices while continuing to buy new supplies of Factor goods for resale at cut prices.

These identified Factor goods can have only one price in the same market at the same time. The lowest price is the highest a buyer will pay in that market at that time. Defendant wants to fix that price by his individual caprice. The Legislature authorizes the price to be fixed by voluntary contracts between the producers and dealers in a competitive market and the Legislature decrees that such contracts shall be protected against nullification by strangers. The Legislature has the same power to decree that prices may be determined by vertical contracts in a competitive market and with protective safeguards to prevent nullification of the contracts as it has to decree that prices shall be determined by capricious individual action.

The Fair Trade Act is not a price-fixing act and if it be construed as one it still is not repugnant to the Federal Constitution.

Defendant admits by his demurrer that he possesses some of plaintiffs' trademarked products and has sold and is selling the same below the prices set for such products in contracts between plaintiffs and their regular dealers.

Defendant contends that plaintiffs and their contracting dealers under the Fair Trade Act are setting prices which defendant must abide by and that this

(a) is a price fixing scheme and

(b) deprives defendant of his right and privilege to do with his own as he wishes.

The constitution does not prohibit price-fixing in businesses which are affected with a public interest.

Munn v. *Illinois*, 94 U. S. 113, 24 L. Ed. 77;
Nebbia v. *New York*, 291 U. S. 502, 54 Sup. Ct. 505, wherein Mr. Justice ROBERTS stated:

"The Constitution does not guarantee the unrestricted right to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited and the right to conduct a business or to pursue a calling may be conditioned * * *. And statutes prescribing the terms upon which those conducting certain businesses may contract, or imposing terms if they do enter into agreements, are within the state's competency (citing many authorities).

"Legislation concerning sales of goods, and incidentally affecting prices, has repeatedly been held valid. In this class fall laws forbidding unfair competition by the charging of lower prices in one locality than those exacted in another, by giving trade inducements to purchasers, and by other forms of price discrimination" (citing statutes and authorities).

Plaintiffs' prices are set by voluntary contracts made with its dealers in a competitive market. If Max Factor products are priced too high the public can turn to competitive trademarked products or even to unbranded goods.

But the statute, being a trade act, does not force defendant to abide by prices set by plaintiffs under their contract plan. Defendant can always close out his entire line at any price he wishes to charge. This case concerns not defendant's full control over property he owns and wants to sell without dictation, but merely defendant's al-

leged right to continue day in and day out, year in and year out, a cut-rate business in nullification of the contracts between plaintiffs and their dealers.

Plaintiff demurs to defendant's demurrer. Defendant can lawfully close out his stock of goods at any time at any price he pleases to charge.

No fight lies there.

The question is—does the constitution guarantee to plaintiffs a vested right to continue a cut-rate business in appellee's branded goods without being guilty of unfair competition and does the Federal Constitution inhibit the Legislature from decreeing that prices on identified goods shall be determined by competition *between producers* rather than between distributors?

The legislature evidently thinks that competition concerned with trademarked or identified goods is better between producer and producer and regulated by voluntary contracts between producer and dealers, than by capricious and individual action of the dealers. The Legislature evidently regards protected-contract-price maintenance as a competitive check upon agency, combination or boycott price maintenance.

It is just as fair and lawful to stabilize prices for branded goods in a competitive market by protected contracts as by agencies, consignments, chains and refusal of sales. Especially are the contracts better because the goods can be freed by close out, damaged goods or court order sales.

Plaintiffs by setting up their own wholesale depots and refusing to sell goods to price-cutters can lawfully project their control over goods as to which they have already parted with title.

If plaintiffs can do that without violating the constitution, the legislature can empower them to part with title to their branded goods subject to a price restriction as to future sales while in the ordinary channels of trade without violating the constitution. The constitution looks to the substance of the thing rather than to forms.

If plaintiffs can lawfully maintain prices on their branded goods by a combination of twenty-one thousand sales agents without transfer of title, they should be permitted to combine the same twenty-one thousand dealers with the same prices set up by contract.

When the public buys a Mazda lamp it does not know or care whether title passed or not while the article was in trade channels. The only difference is that when title does not pass in trade transfers, the public has to pay for a more expensive and more discriminatory method of doing business than when title does pass.

The Act in question instead of being capricious and discriminatory has sought to prevent discriminations which now exist in intrastate and interstate trade because concerns of large capital can prevent price-cutting on their goods by means of lawful but expensive agencies, consignments, refusal of sales and chain systems; while small concerns cannot use the more democratic system of protected vertical resale contracts.

From the standpoint of public, trade and legislature, the only difference between price maintenance based on retention of title or consignment systems and protected contract systems is wholly in favor of the latter.

An undue emphasis on price maintenance based on retention of title or projection of control after title has passed by refusal of further sales, has turned out to be a policy which fosters monopoly.

The Fourteenth Amendment does not inhibit the State from legalizing price maintenance based on vertical contracts with passage of title permitted and adequate protection afforded against damage by strangers, as a competitive check upon already lawful systems of price maintenance based on consignments, agencies or refusal of continuing sales, by declaring in effect that trademarked articles belong under the exception to the rule against alienation and may be sold or transferred with a valid restriction upon prices while in the ordinary channels of trade, such valid contracts being protected against damage for nullification by non-confirmist traders under well-known equitable and police principles.

Section 1 ½ is the heart of the act. If that is killed the whole act dies. If the contracts are good (and their validity is not questioned) Section 1 ½ is a reasonable and ordinary means for their protection. If Section 1 ½ is bad, the contracts are no good to anyone at any time, whether valid or not.

Why did the General Electric Company raise the many millions of dollars necessary to stock twenty-one thousand or more dealers all over the United States with Mazda lamps title to which was retained until a consumer sale was made? They assumed this monumental burden merely to keep one or two price-cutters in each market from getting any lamps. One bad oyster spoils a stew and one price-cutter makes a whole market sour.

Why did the great shirt and collar companies raise the vast sums required to retain title to their trademarked products at wholesale in every important market in the country? They did it so as to project their control over all the goods they had already sold and on which title had already passed to retailers. They supplied retailers on a hand-to-mouth basis so that one who cut a price today would be out of stock tomorrow. In short, the potential menace of one price-cutter in each market robbed the formerly independent wholesalers of the business they had formerly done in these important trademarked goods.

Both the General Electric Company and the shirt and collar people took up these gigantic bows which no little producer could bend, because this honorable court, in the case of *Dr. Miles Medicine Company* v. *Miles, supra,* said to them that if title to their goods passd, they were restrainers of trade but if the title did not pass they were not restrainers of trade. This court freed the goods from contract restrictions and thereby enslaved the formerly independent retailers who became hired, regimented agents charging dictated prices for goods they did now own.

What social, economic or legal gain was that? What price does the public pay when it forces the unwilling Electric Company to continue to own millions of Mazda lamps all over this vast country, merely to prevent one or more price-cutters in each market from getting any of the goods? Independent wholesalers and retailers would gladly purchase these goods under price restriction contracts if permitted and protected against unfair competition.

These two instances are graphic evidences of the fact that Section 1½ is the heart of the Fair Trade Act. If price cutters could lawfully get hold of Mazda lamps to sell at

cut prices, the whole agency or consignment plan of price protection would collapse and be abandoned. If price cutters can sell the same goods at lower prices, the contracts are nullified and fall. When a price-cutter marks down a trademarked article on his own shelf, he marks down the same article on the shelves of all his competitors.

For the court to hold that the contracts are good in California (and the appeal concedes this) but that, constitutionally speaking, they cannot be protected against non-contract nullifiers, is to say that the body may live but the heart must die. It is to say that the *Miles-Park* rule, grounded in common law principles of alienation, shall be embalmed in the Constitution and become alterable only by constitutional amendment.

It makes no difference whether the result is reached by holding the contracts themselves to be invalid, as the court did in *Miles* v. *Park, supra,* or by holding that the contracts are valid but that they cannot be protected, in view of the 14th Amendment, against nullification by strangers, as the defendant argues here, the effect is the same in either case.

If the court shall hold that Section 1½ of the California Act is unconstitutional, the pernicious doctrine that prices may be stabilized by agency, chain-outlet, refusal of sale and other plutocratic combinations, but that the same result cannot be reached by democratic protected contracts, will become embedded in the 14th Amendment and the Sherman Anti-Trust Act will become a legal monstrosity—the father rather than the destroyer of trusts—the protector of the rich and a juggernaut crushing out small, independent producers, wholesalers and retailers.

Other producers besides the General Electric Company may lawfully make incandescent electric bulbs, but they

can get no distribution unless they protect their dealers against price-cutters. That means that unless Section 1½ of the Act in question is sustained, little producers cannot operate without having to supplement their manufacturing capital with unprocurable sums of distributing capital. To laden production with the burden of vast capital necessary for distribution without sale or transfer of title is in effect to deliver production over as a monopoly of the wealthy; to create an Aladdin's Cave to which only those of the Midas class have Open Sesame.

It is this mistaken policy which has helped to convert a minimum capital country with its small independent producing and distributing units into the maximum capital country it has become since loss-leader price-cutting became legalized and rampant.

The Legislature of California believes that the Act in question will tend to turn the tide of maximum capital economy—of giant combines—back toward the former days of minimum capital economy based on small independent, competitive producers and dealers each performing its own function as producer or distributor—each living and letting others live.

It would be interesting to speculate when and how anything could ever have gotten into the Federal Constitution that could possibly prevent the Legislature of California from declaring that contracts shall be both free and inviolate from destruction by selfish strangers—by knaves operating for ulterior purposes as Mr. Justice HOLMES phrased it in his dissent in the *Miles-Park* case.

Surely a country whose Constitution upholds the right of Goliath to have his spear but prohibits David to have his slingshot is heading away from democracy toward what Mr.

Justice HOLMES in *Miles* v. *Park, supra,* so prophetically described as "perilous country".

The judgment appealed from should be affirmed.

Respectfully submitted,

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